

No. 15412-15413

United States
COURT OF APPEALS
for the Ninth Circuit

UNDERWRITERS AT LLOYD'S, LONDON,
ENGLAND,

Appellant,

vs.

JANE S. LYONS,

Appellee.

GLEN FALLS INDEMNITY CO., a Corporation,
Appellant,

vs.

JANE S. LYONS,

Appellee.

BRIEF FOR APPELLANTS

*Upon Appeal from the United States District Court
for the District of Oregon.*

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*Upon Appeal from the United States District Court
for the District of Oregon.*

BASIS OF JURISDICTION

These actions originated in the United States District Court for the District of Oregon by Appellee filing complaints wherein she sought to recover on two accident policies issued by the Appellant Underwriters at Lloyd's,

London, England in the amounts of Seventy-five Thousand Dollars (\$75,000) and Twenty-five Thousand Dollars (\$25,000) respectively, and one accident policy issued by the Appellant Glens Falls Indemnity Co., a Corporation, in the amount of Five Thousand Dollars (\$5,000), wherein the named insured was James Alexander Lyons and Appellee the sole beneficiary.

The jurisdiction of that court was based on diversity of citizenship, under the provisions of Title 28, U. S. Code, Judiciary and Judicial Procedure, Section 1331, in that Appellee was a citizen and resident of the State of Oregon, the Appellant Underwriters at Lloyd's, London, England was an association of individuals, none of them being citizens or residents of the State of Oregon, and the Appellant Glens Falls Indemnity Co., was a corporation organized and existing under and by virtue of the laws of the State of New York (R. 3).

Following pre-trial conferences the District Court entered a Pre-Trial Order which set out the admitted facts (R. 10-12; R. 8-11) and defined the specific issues to be tried (R. 15-16; R. 13-14). The cases were consolidated and tried to the court without a jury.

The trial court rendered its opinion (R. 19-22; R. 17-20) made and entered its findings of fact and conclusions of law (R. 23-26; R. 21-25) and on November 13, 1956, judgments in favor of the Appellee were filed (R. 27-28; R. 25-26).

On December 11, 1956, notices of appeal, together with undertakings for costs on appeal, were filed with the District Court Clerk's office (R. 29-30; R. 27-28).

This court has jurisdiction of the appeals under the provisions of Section 1291 of Title 28, U. S. Code, Judiciary and Judicial Procedure, and the same were consolidated for printing and oral argument purposes (R. 37-38; R. 33-34).

STATEMENT OF THE CASE

THE ADMITTED FACTS

The pertinent facts determined to be undisputed in the Pre-Trial Order and set forth in the uncontroverted findings of fact of the lower court may be summarized as follows:

That on the 10th day of February, 1953, there was in full force and effect Appellant Underwriters at Lloyd's, London, England's accident policy No. 0-OMC-1740 in the principal sum of Seventy-Five Thousand Dollars (\$75,000) and No. 0-5058-1 in the principal sum of Twenty-five Thousand Dollars (\$25,000) wherein James Alexander Lyons was the named insured and the Appellee the designated beneficiary, payable in the event James Alexander Lyons:

(a) Sustained bodily injury caused by accidental, violent, external and visible means, which shall solely and independently of any other cause within three calendar months from the date of the accident causing such injury occasion his death; and

(b) That the assured's death was not directly or indirectly caused or contributed to by disease or natural causes.

(R. 10-11; 23-24) and Appellant Glens Falls Indemnity Co. accident policy No. 22148 in the principal sum of Five Thousand Dollars (\$5,000) wherein James Alexander Lyons was the named insured and Appellee the designated beneficiary, payable in the event James Alexander Lyons:

(a) Sustained a loss resulting directly and independently of all other causes from bodily injuries sustained and effected solely through accidental means.

(b) That the policy shall not cover death caused directly or indirectly, wholly or partly, by bodily or mental infirmity or by any other kind of disease (R. 9, 21-22).

Additional pertinent facts determined to be undisputed in the Pre-Trial Order and not set forth in the findings of fact of the lower court may be summarized as follows:

That on February 10, 1953, James Alexander Lyons died in the country called Los Llanos, Southern Territory of Lower California, Mexico, and as a result thereof an inquest was conducted, an autopsy performed, and a death certificate (Ex. 44), the English translation thereof is set forth in Appendix A, which was duly recorded, certifying the cause of death as:

“That the cause of death was owed to an aortical insufficiency that probably provoked the sudden fatigue of the heart, having found moreover atheromatous deposits of the coronary arteries.” (R. 11-12)¹

Appellee filed proof of death of James Alexander Lyons with Appellants incorporating copies of the foregoing official document as well as two affidavits of Dr. Homer P. Rush certifying as to the cause of death (R. 11-12)¹. The proof of death with attachments (Ex. 7) omitting the documents in the Mexican language, but incorporating the English translation thereof, is set forth in Appendix B.

Based on the proofs of death the Appellants rejected Appellee's claim and these actions were instituted.

THE ISSUES

The issue for determination in the lower court was whether the death of the insured James Alexander Lyons was one within the policy coverage and without the policy exclusions.

THE FACTS

The Insured

He was an outdoor man, used to considerable exertion, both mental and physical (R. 54-60). He kept his physical complaints to himself (R. 140). He was an expert hunter, familiar with firearms, advocating guns could be handled in safety (R. 60, 156, 228-229).

The Insured's Medical History

The evidence established that:

On May 12, 1950, Mr. Lyons, while walking across a dock was seized with chest pain which radiated down

¹Reference is made to Transcript of Record in case No. 15412 for the sake of brevity.

his arms to the extent he could not hold a telephone. He was examined by Dr. McKeown at Coos Bay, Oregon, who subjected him to the usual cardiac tests and diagnosed the pain as being due to intercostal neuritis and anxiety tension (R. 196-199). However, Dr. McKeown advised Dr. William McBride of Palm Springs, California, Mr. Lyons had to be slowed down (Ex. 18) as he was fearful that something would happen to endanger his life (R. 204-205).

On February 3, 1953, Mr. Lyons returned to Palm Springs, California, from an extensive business trip (R. 56-58) and during the night had an attack of pain in his chest (R. 135). On February 4, 1953, he consulted Dr. McBride, complaining of constriction in the chest with radiation down the arms which occurred on February 3 and 4, 1953. Dr. McBride performed the usual cardiac tests, which were within normal limits, and without objective symptoms of heart disease (Ex. 2, p. 4-5). Dr. McBride diagnosed the condition as cardiac fatigue pain due to emotional stress from the business trip (Ex. 2, p. 4). Dr. McBride's office notes reveal:

"2-4-53: Has had attack of chest pains yesterday and today. Constriction in chest and radiation down arms. Flourescopic and EKG not diagnostic. Sed rate (illegible word) also WBC and uric acid. RX nitroglycerine 1/200 on onset of pain. May need *thaverine*.

"2-5-53: Pain some imp. advised to go fishing."
(Ex. 18)

Dr. McBride advised Mr. Lyons not to do any "excessive work, such as tramping around fields or any

heavy lifting" (Ex. 2, p. 4), as he was interested in Mr. Lyons getting some rest as "this underarm pain was a brand new symptom, never manifested it before." (Ex. 2, p. 8).

The Insured's Death

On January 10, 1953, the insured, Drs. Rush and Chamberlain, and Mr. Lyon's airplane pilot, Mr. Parrick, arose about 5:00 o'clock A. M., had breakfast and were met by Senor Ruiz and his son, who were taking them dove hunting (R. 154-155). They arrived at the hunting area about 7:00 o'clock A. M. and the doves commenced flying about 7:30 A. M. (R. 180). The country was of a semi-rough, sandy nature with sand dunes, sage brush and shemise (R. 155). The party walked around the countryside over a distance of one-half mile, up and down sand dunes 80 to 100 feet in height. The walking was rather difficult (R. 156-157).

The party separated and Mr. Lyons and Dr. Rush were spaced some 60 yards apart where Dr. Rush could not see the insured because of the brush (R. 182-183). While the insured and Dr. Rush were separated, the latter heard Mr. Lyons shoot at intervals, saw doves fall and then there were two shots in rapid succession, about 2 to 3 seconds apart (R. 419-420). Within a period of 5 to not longer than 10 to 12 seconds, Dr. Rush heard stertorous breathing and believing that Mr. Lyons might be in some difficulty started in his direction and found him, within a period of 30 seconds, in an unconscious, cyanotic and pulseless condition (R. 422-423). Mr. Lyons had moved a distance of some 30 yards (R. 181).

from the point where Dr. Rush left him and was found lying face down with the upper half of his body under a mesquite bush with the shotgun under him, the muzzle protruding upward diagonally from a point just below his left shoulder approximately 1 foot, and the butt of the gun protruding at an angle from a point past his right hip (R. 185). Dr. Rush noticed blood on the side of the insured's face, called for help, which arrived within a period of 20 to 40 seconds, Mr. Lyons was rolled over and away from the bush within a matter of 5 seconds, pulmonary edema developed within a period of 5 seconds and he expired within "just a few moments" after Dr. Rush's arrival (R. 423-426), notwithstanding the administration of artificial respiration (R. 188).

Dr. Rush examined the insured's wounds noting scratches and erosion on the right side of the face, neck and temple, together with some powder burns and he felt what he interpreted to be one pellet under the skin (R. 188-189). The injuries were very slight and of a superficial nature (App. B, p. 62, 65; R. 304, 478-481. At that time Dr. Rush was of the opinion the death of Mr. Lyons was not the result of the superficial injuries, but a heart death from the way Mr. Lyons acted clinically (R. 428-429).

The immediate area was examined and no evidence of a gun blast on the ground or in the brush was found (R. 190). The gun involved was a Winchester 12-gauge magnum pump shotgun (Ex. 1) which was in perfect working condition, could not be discharged with the safety on or off by striking the gun on a concrete floor

(R. 70-71) and a pull of $4\frac{1}{4}$ to 5 pounds was required to trip the trigger to discharge the gun (R. 74).

The Mexican authorities investigated the occurrence, transported the insured's body by car to San Jose del Cabo, a distance of approximately 50 miles, and that evening Dr. Serrano and Dr. Rodriguez performed an autopsy. The following day an inquest was held (App. A).

The findings on the post mortem examination which were considered significant by the medical experts testifying at the trial, as retranslated by Dr. Jose J. Christen, were:

"Blood crusts in the right and left side of the face. They were more abundant in the first mentioned side. When these were lifted powder dust was found to be incrustrated in the palpebral, temporal regions and on the ear lobe of the right side. Skin scratches of founded and linear shape were present in irregular distribution in the rest of the fact. There is a circular shaped orifice with inverted margins of an approximate diameter of one millimeter in the frontal region, right half, at the site of the hair line. Skin scratches were found on the neck which became evident when the blood crusts on them were lifted; the limits and distribution of these scratches were irregular, but they more precise than the ones on the face; they vary from half to one millimeter in length approximately. Scratches on the external aspect of the arm, lower third, elbow, external and posterior aspects of forearm and dorsal aspect of the right hand. Skull, shape and volume were normal, when the scalp was detached it was noticed that the orifice present in the right frontal region did not reach the bone in depth and that its contours were lost in the fat tissue. * * *

"The right lung was found to be free. Both lungs were found to be congested. On cut section black liquid blood seeped out. The superior and inferior left lung lobes were fused together. The pericardium was found to be thickened and it had strong adhesions to the diaphragm. The heart was surrounded by a dense coat of fat tissue. The left ventricle was slightly hypertrofied, and the semicircular valves of the aorta were thickened and hardened with atheromatous deposits, Mitral valve was slightly dilated. The coronary arteries were dissected and they were found to have a diminishment in their calibre due to the presence of atheromatous plaques. Abdomen. The liver was very enlarged in weight and volume. It was of dark red color that on cut section presented slight resistance. Gall bladder was full dark green bile in about 40 cc. It also contained two gallstones, the first one of 1cm. of diameter approximately placed at the cystic duct outlet and a second one which was smaller of 3mm. of diameter in the fundus. The rest of the organs of the abdomen were without pathological alterations.

"Conclusions. It is considered as the direct cause of death 'Aortic insufficiency that probably brought about the acute cardiac failure.' Secondary lesions related to the cause of death Coronary atheromatous plaques (coronary insufficiency), pulmonary congestion and hydatomegalia. Lesions that are independent from the cause of death—Scatches on the face and neck. Powder dust incrustations. Biliary lithiasis. * * *" (Ex. 15)

Subsequent ex-party examination of the autopsy surgeons (Ex. 14) revealed: there was no evidence of antemortem clotting or embolus in the pulmonary artery; the semicircular or semilunar valves were thickened and hardened; there was hypertrophy of the left ventricle; the left and right coronaries were dissected and atheromatic plaques were found; that the doctors were unable

to state the diminishment in the diameter of the coronary arteries; and two gallstones, one of one centimeter in diameter was lodged in the union of the cystic canal with a common bile duct and a smaller one of 3 millimeters in diameter in the fungus of the gall bladder, both were free (R. 106-108). A subsequent post mortem examination was conducted by Dr. William Lehman, a qualified pathologist, who found nothing medically important as the involved viscera was not with the body (R. 116).

THE COURT'S FINDINGS

After six days of trial consisting primarily of medical testimony, the court rendered its opinion (R. 19-22) and thereafter entered the following controverted findings of fact:

"V.

"On or about the 10th day of February, 1953, the said James Alexander Lyons sustained bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his death within three calendar months from the date of the accident which caused said injury. Said injury was caused by the accidental discharge of a shotgun. (R. 24)

"VI.

"Said James Alexander Lyons was a vigorous, robust man of normal health for his age and was not suffering from disease. His said death was not caused or contributed to directly or indirectly by disease or natural causes." (R. 25)

QUESTION PRESENTED

Whether there is any competent, satisfactory evidence to support the court's findings of fact numbered V and VI (*supra*)?

STATEMENT OF POINTS TO BE URGED

1. The court erred in failing to enter judgment for Appellants.

2. The court erred in finding that the assured, James Alexander Lyons, on or about February 10, 1953, sustained bodily injury caused by accidental, violent, external and visible means which solely and independently of any other cause occasioned his death within three calendar months from said date.

3. The court erred in finding that said assured, James Alexander Lyons, suffered an injury, on or about February 10, 1953, from an accidental discharge of a shotgun which caused the assured's, James Alexander Lyons', death.

4. The court erred in finding that said assured, James Alexander Lyons, was a robust man for his age, was not suffering from disease, and that his death was not caused or contributed to directly or indirectly from disease or natural causes.

5. The court erred in considering speculative, incompetent and inadmissible evidence in finding for Appellee.

6. The court erred in entering a judgment in favor of Appellee, Jane S. Lyons.

7. The court erred in failing to find that the Appellee failed to sustain her burden of proof by any competent, substantial evidence that the discharge of the shotgun preceded the onset of the fatal heart attack which caused the assured's, James Alexander Lyons', death.

8. That the court erred in failing to find that the Appellee failed to sustain her burden of proof by any competent, substantial evidence that any bodily injury which may have been sustained by the assured, James Alexander Lyons, solely and independently of all other causes resulted in the assured's, James Alexander Lyons', death.

9. That the court erred in failing to find that the Appellee failed to sustain her burden of proof by any competent, substantial evidence that the assured's, James Alexander Lyons', death was not caused or contributed to by a pre-existing heart disease.

SUMMARY OF ARGUMENT

There is no competent substantial evidence in the record to sustain the court's findings V and VI, *supra*, and those findings are based on evidence which was speculative, inadmissible and "opinions" reached by a process of basing inferences on inferences.

ARGUMENT

The court erred in entering its findings of fact numbers V and VI, as there is no competent substantial evidence to support the contested findings.

In Oregon, the Appellee had the burden of proving the death of the insured resulted from accidental bodily injuries which solely and independently of any other cause occasioned his death and that the insured's death was not directly or indirectly caused or contributed to by disease or natural causes. *Seater v. Penn Mutual Life Insurance Company*, 176 Or. 542, 156 P. 2d 386, 159 P. 2d 826; *Hutchison v. Aetna Life Insurance Company*, 182 Or. 639, 189 P. 2d 586.

The autopsy report, as retranslated (Ex. 15), and the official death certificate (Ex. 44) constituted prima facie evidence of the cause of death. *State v. McDonald*, 55 Or. 419, 103 P. 512, 104 P. 967, 106 P. 444; *Seater v. Penn Mutual Life Insurance Company, supra*. The only known fact, and upon which all medical experts were in agreement, is that the insured died of a heart attack.

This appeal, of necessity, is limited to the question of the sufficiency of the evidence to support the court's contested findings which involve the issues of: (A) Whether there is any competent substantial evidence an accidental discharge of the shotgun preceded and precipitated the insured's fatal heart attack, (B) whether there is any competent substantial evidence an anguish and pain reflex from the discharge of the shotgun solely and independently of all other causes resulted in the in-

sured's death, and (C) whether there is any competent substantial evidence the death of the insured was not caused or contributed to by disease.

A. There is no competent substantial evidence an accidental discharge of the shotgun preceded and precipitated the insured's fatal heart attack.

While the trial of these cases consumed six days of complex medical evidence, the only testimony on this primary and all essential fact consisted of the following questions and answers of Dr. Francis Chamberlain and Dr. Homer P. Rush.

The "Opinion" of Dr. Chamberlain:

"Q. And finally, I note further that on—now, Doctor, I will ask you to state whether or not—what in your opinion from your personal observation of the history given of Mr. Lyons' health, the medical records; the testimony of Dr. Rush as to what he saw, what in your opinion was the cause of his death, Mr. Lyons' death? * * *

The Witness: I have examined all the facts and it is my belief from the examination of these facts that this man died as a result of the gunshot wound to the face. * * *

Q. (By Mr. Maguire): Why did you say that that was the cause of death, what did it do, in your opinion?

A. I think that the gunshot caused Mr. Lyons suddenly to have pain. He was startled. The usual reaction is one of anguish, as well and that these things then create the clinical condition which we refer to as 'shock.' I think that—so that I think they produce shock at the same time I feel that the patient—that the gunshot wound was the direct

cause of his heart developing an unusual abnormal rhythm. * * *

The Court: Well, I am going to deny the motion. Now, Doctor, this man Mr. Lyons was an experienced woodsman and hunter as has been testified to here. How do you account for the fact that the mere discharge of a shotgun would so disturb the function of his heart and rhythm that it would cause his death unless there was some pre-existing condition there which was present at the time of the firing of the shot?

The Witness: Well a man like—such as this—who was an experienced hunter who had a gun go off in his face, this is emotionally in my opinion, apt to be much more shocking than some greenhorn. This man had prided himself and he had (205) so told me. I wasn't asked, but I should be glad to mention it, in the course of the earlier discussion I mentioned that he and I spent a good deal of time talking about children and having them brought up by women, and that is his main thought in this respect was to see that his only son was taught to be an experienced hunter, and that in spite of various objections from the feminine side, that he had been able to convince everybody that this boy should be taught to be a hunter, that this was a man's sport, that it could be done in complete safety. I think that probably means that his foundation of his consciousness of what was right or wrong, good or bad, perhaps was such, I think, that to him would be a greater shock than I, as a once-in-a-while hunter. I would think that that was one factor in contributing. I also felt from the observation I made of his face, certainly he received—there was evidence on his face, of a good deal of trauma, I assume from the gun, that the man must have had a good deal of pain. Now, hearts, though such an instrument which is normal can develop abnormal rhythms it is true, they are more apt to develop abnormal rhythms in the heart as a result of some underlying

disease. My feeling that the man had an abnormal rhythm is based on two or three unusual facts. One of these is that Dr. Rush, who was an experienced observer, who was this man, has told the Court that he felt a purring on this man's chest; a purring on a man's chest is a very unusual finding to observe when a man is unconscious and (206) the usual cause of the purring sensation on a man's chest, when he is entirely unconscious, providing the purring sensation did not pre-exist, is an unusual type of heart rhythm which we refer to as ventricular fibrillation or ventricular flutter, that is the purring sensation, then I think, as I have stated earlier, as I mentioned earlier, this was no ordinary type of death, because that man—I should say that usually when a heart stops suddenly, and I have seen it happen many, many times in my work—when a heart stops suddenly there is a short period of time, a few seconds, and then a patient develops the stertorous snoring type of breathing. The stertorous snoring type of breathing usually lasts a period of a half minute or less. This stertorous type of breathing in this man continued for a long time. This continued, Dr. Rush described, for a good many minutes. I have another reason—may I go on? I have another reason for believing that this was a rhythm of this type, and that is that this man who previously demonstrated no signs of heart failure, even though we observed him and were with him constantly, that this man showed something else which was unusual, and that was that Dr. Rush described two or three minutes after he had watched him with this stertorous type of breathing, the foam and then pink-tinged foam appeared at the mouth, and even the Mexican autopsy report stated the man had signs of congestion in his lungs, and congestion in (207) his liver.

“Now, a man whose heart suddenly stops does not develop manifestations of congestive heart failure in a half minute. It takes at least a few minutes to develop. Furthermore, there was evidence brought

out by Dr. Lehman this morning that there was induration, swelling around the lacerations on his face, which don't occur momentarily, but take a matter of a few minutes to develop. For all those reasons then, I believe that this was not an ordinary death. That the gunshot touched off some unusual heart rhythm, that is the ventricular fibrillation, or perhaps a combination of these two or another rhythm which I have observed, and which may occur is what we call the ventricular tachicardia where the heart beats very rapidly at the rate of about 300 a minute, much too fast to have sufficient filling to be able to drive blood to the brain sufficient to let a patient maintain consciousness or to nourish the brain and yet sufficient to produce that purring sensation and allow life to be maintained for a longer time than usual, so for all these reasons I think that that suggested an unusual mechanism must be called in which is the only explanation that I can make in this particular case." (R. 226-231)

The "Opinion" of Dr. Rush:

"Q. (By Mr. Beebe): Now, Doctor, in your opinion, is it possible that a shotgun blast close to the face, which was sufficient to cause powder burns and scratches and wounds such as you described on your examination, is sufficient to bring about a state of medical shock such as you have described in giving your reasons for your prior answer? (363) * * *

The Witness: If I understood the question correctly, do I believe that the shotgun explosion could cause the shock, and in my opinion, it could cause it.

Q. (By Mr. Beebe): The corresponding medical shock, yes.

A. That is my opinion, that it could, yes, sir." (R. 377-378)

Drs. Rush and Chamberlain assumed as the foundation of their "opinions" the very fact in issue—that the

shotgun was discharged prior to the onset of the insured's fatal heart attack (R. 311-2, 372, 481, 486-7).

Drs. Rush and Chamberlain assumed as one of the necessary premises of their "conclusions" that the reported diminishment of the caliber of the coronary arteries of the insured from atheromatous deposits (Ex. 15) did not precipitate the fatal heart attack by engaging in speculation and conjecture as to the extent of the involvement of the coronary arteries (R. 266, 271, 312, 445, 487-9), however admitting it was a possibility and could not be ruled out in this case (R. 485-7).

Dr. Chamberlain assumed the occurrence would have been more emotionally shocking to the insured than others based not on evidence in the record nor admissible—the insured's statements concerning family differences of opinion over the safety of hunting (R. 228-9) and by resorting to speculation and conjecture assumed the insured suffered an anguish reflex, or emotional trauma, as a result of the discharge of the shotgun. Dr. Chamberlain on cross-examination, testified:

"Q. Could emotional factors precipitate coronary insufficiency?

A. Usually an emotional factor will not precipitate it nearly as readily as physical exertion will. As a matter of fact, at the university we used a cap pistol in the course of our taking an electrocardiogram, at the University of California electrocardiology department when I was there, and in the course of taking the examination we shot a cap pistol off and said, 'Oh, my,' as though the machine had broken, to see if we could produce electrocardiographic changes, and the chance of producing the changes like that, from some sort of a fright, was very exceptional that we could; * * *

Q. But it is medically possible for an emotional factor such as this to precipitate a cause of acute coronary insufficiency?

A. It's possible, but I don't recall an instance off-hand of any patient who had his coronary pain during the course of excitement, rather than exercise, unless there is something else physically which intervenes, such as hardening of the arteries or an arthritic infirmity, or something of the sort. The first thing that happens the patient will tell you is pain that comes on on the peak of physical exertion." (R. 273-275)

Q. (By Mr. Kriesien): Is there adequate information, for you, Doctor, to be able to state whether the pain suffered as a result of the—of that accident would be greater than that suffered from the lacerations of the face?

A. I have no way of knowing, but he must have been burned, for one thing, which is a painful affair. The severity of the trauma isn't necessarily closely related to the severity of the pain. I think that it's impossible to ask a person to say if this hurt, other than I know that I felt that the emotional trauma associated with the gunshot wound was an important factor, because this man's belief that his boy, who meant more to him than anything in his life, I should say hunting life, even though the women say it is dangerous stuff, and you shouldn't do it, I think is a strong emotional factor here, but I can't say that—oh, because of error, I don't think anybody can say with any certainty, whether there would be any shock associated with it. The degree of shock roughly parallels the degree of trauma, but the association isn't an expectant one." (R. 302)

Q. All right. What about this anguish reaction you were speaking of, could that alone have resulted in death?

A. Anguish alone can produce a chain of events which can result in death. The patient—I mean it isn't very common, but there is plenty of it on the

record, scattered cases here and there, where a patient, from an emotional reaction of joy or anguish suddenly dies, in which case the mechanism is usually one considered to be of some abnormal rhythm (286) developing in the heart. Again, there is a lot of guesswork as to this, because you don't have all the gadgets that shows what the pressure is doing, or what the heart is doing, because sudden deaths are unexpected." (R. 304)

If we remove these incompetent "facts" which Dr. Chamberlain assumed and considered to be of importance in reaching his "conclusion," his remaining testimony does not support a conclusion an accidental discharge of the shotgun preceded and precipitated the fatal heart attack as superficial injuries such as sustained by the insured do not commonly result in death (R. 305, 479).

Aside from the speculation indulged in by Dr. Chamberlain's assuming an anguish or emotional reflex, as evidenced by the foregoing testimony, the "opinion" is of no probative value as it was based partly on statements of the insured to the doctor which could not have been admitted in evidence. In *Henderson v. U. P. R. R. Co.*, 189 Or. 145, 219 P. 2d 170, it was held that a medical expert's opinion was of no probative value for the reason it was based, partly at least, on the history given by the plaintiff. The court stated at page 165:

"That his testimony did not have reference solely to the facts assumed in the hypothetical question addressed to him but as well to information otherwise obtained, appears in several places in the record. * * *

"Dr. Mintz' opinion that the blow caused the osteomyelitis was, according to his own statement, based upon the history given him by the plaintiff. That opinion and its background cannot be separated from his judgment as to the connection between the blow and the gangrene. He himself combined the two in the explanation he gave when asked whether damage could be done to the artery without damaging the bone and in his sweeping statement that the blow 'aggravated anything he had there before.' * * *

"9. But, putting that to one side, his categorical statement on cross-examination that there was a connection between the blow and the gangrene is without probative value because it was based, partly at least, on the history given him by the plaintiff.

"10. It is the rule in this state, as elsewhere, that 'an expert, though thoroughly qualified as a witness, cannot be permitted to give an opinion upon facts known to him, and not communicated to the jury'; that 'no allegation can be proved by the *ipse dixit* opinion of any expert unless the facts or phenomena upon which he bases his opinion are disclosed either by his own testimony or that of other witnesses.' *State v. Willson*, 116 Or 615, 619, 620, 241 P. 843; *State v. Simonis*, 39 Or. 111, 116, 65 P. 595. See, also, *Lippold v. Kidd*, 126 Or. 160, 164, 269 P. 210, 59 A.L.R. 875; Rogers, op. cit., 106, § 52; Wigmore, op. cit., 792-3, § 672, 799, § 680. In *Lippold v. Kidd* we said:

" 'The expert witness is granted the privilege of expressing to the jury an opinion because his superior training enables him to arrive at a conclusion which is more likely to be sound than that of the average juror. But all opinions are based upon facts; generally the recipient of an opinion is at a loss to know what use he may advisedly make of an expert's opinion unless he also knows what facts the expert took for granted when he formulated his conclusion.'

"In the present case Dr. Mintz relied on facts which not only were not in evidence but which could not have been admitted in evidence—the *ex parte* statements of the plaintiff made to the witness, not as communications between doctor and patient but between a party to a lawsuit and a doctor examining him for the purpose of qualifying himself to testify as an expert on the former's behalf. *Watrous v. Salem Brewery Ass'n.*, 151 Or. 294, 303, 49 P. 2d 375; *Wise v. State Ind. Acc. Comm.*, 148 Or. 461, 35 P 2d 242; *Reid v. Yellow Cab Co.*, 131 Or. 27, 279 P. 635, 67 A.L.R. 1. In a similar case the court said:

"* * * The opinion of the doctor is indivisible; it must be accepted or rejected as a whole; there is nothing to indicate how much it rests on the declarations, and how much on personal observation. The jury should not have been allowed to guess what it would have been in the absence of the declarations, or any part of them, and to estimate its value accordingly.' *Delaware, L. & W. R. Co. v. Roalefs*, 70 F. 21, 24.

"Counsel for the defendant moved to strike Dr. Mintz' testimony concerning aggravation of arteriosclerosis, after the basis of his testimony had been disclosed. The court denied the motion. We think that it should have been allowed."

The propriety of eliminating the incompetent evidence to determine if the finding is founded upon speculation and conjecture as enunciated in *Bridenstine v. Gerlinger Motor Car Co.*, 86 Or 411, 168 P. 73, 972, wherein the court stated at page 426:

"It is strenuously insisted that there was enough competent evidence to carry the question of Hargroves' agency to the jury. Verdicts must be supported by evidence; and they cannot stand when founded only upon supposition, speculation and

conjecture. As we read the record, the most that can be said for the verdict, if the incompetent evidence is first eliminated and if it is then assumed that the verdict rests upon a finding that Hargroves was an agent of the company, is that it was founded upon speculation and conjecture: *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355, 369 (153 P. 470); *Parmelee v. Chicago M. & St. P. Ry. Co.*, 92 Wash. 185 (158 P. 977)."

Dr. Chamberlain did not testify that in all "probability" a discharge of the shotgun preceded and precipitated the fatal heart attack. In his answers, *supra*, he used the terminology "I think," "it is my belief," and concluded:

"* * * so for all these reasons I think that that suggested an unusual mechanism must be called in, which is the only explanation that I can make in this particular case." (R. 226-231)

On cross-examination he testified with relation to the precipitating cause of the fatal heart attack:

"* * * I think a combination of all these is quite sensible as an explanation." (R. 298)

"* * * but I think the chain reaction which was started off by this is a very sensible one." (R. 299)

Dr. Rush in relating his "opinion" as to the chain of events used the terminology "I believe," "I think," "I felt," and concluded:

"So I then must assume that it was some strong emotional factor that initiated it, because the other factors were not there." (R. 375-77)

On cross-examination, concerning the chain of events, he testified:

"* * * it would seem to me that we would have to

explain it on the basis of some outside emotional or outside cause for an emotional upset of some kind. I don't know of any other way to explain it." (R. 410)

It is elementary law that medical testimony in the terms of mere "possibility" will not lift the case out of the area of conjecture and speculation and fails to constitute substantial evidence for any purpose. In *Devine v. Southern Pacific Co.*, 207 Or. 261, 295 P. 2d 201, the court stated:

"2, 3. We have often stated that an issue of fact may be submitted to a jury only when the proof shows reasonable certainty as opposed to 'a finding dependent upon conjecture and speculation,' and that mere possibility, alone, of a causal relation between an injury and a physical result are insufficient to lift the case out of the area of conjecture and speculation. *Henderson v. U. P. R. R. Co.*, 189 Or. 145, 160, 219 P. 2d 170.

"It must be admitted that the answer to this question lies solely in the realm of medical science. In a case such as this, where 'the physical processes terminating in the death are obscure and abstruse,' the triers of fact, without the aid of expert testimony, can only speculate upon the effect of the trauma as resulting in the disease causing death. Any facts that could be shown by the plaintiff, apart from the medical testimony, would not warrant a conclusion that the cancer which resulted in death was caused by the blow from the falling cattle car door." (p. 265)

"4. While the doctor's explanation of his answer to the hypothetical question would be insufficient to establish a causal relation, because of possibility only appears, nevertheless, without objection, he stated that in his opinion the injury received caused the diseased condition which resulted in Devine's

death, and we are of the opinion that the positive statement of the fact of causation raises the quality of the evidence from possibility to probability. Note to 135 ALR 541, and cases cited therein.

"The defendant, however, points out that the doctor's positive statement, like his answer to the hypothetical question, is improper and should have been stricken on defendant's motion, because both were based upon information not contained in the record.

"5, 6. An expert must state his opinion upon facts presented in the record, for the reason that a jury must determine the weight to be given the opinion, and, without knowledge of what facts the expert accepts as true, an evaluation of his opinion is impossible. *Henderson v. U. P. R. R. Co.*, *supra*; *Lippold v. Kidd*, 126 Or. 160, 269 P. 210, 59 ALR 875.

"7. Nevertheless, the defendant cannot now complain, because it specifically waived its objection to the hypothetical question." (p. 272-3)

In *Henderson v. U. P. R. R. Co.*, *supra*, the court stated at page 160:

"* * * The question here, however, is not one of the admissibility, but of the sufficiency, of evidence; and medical testimony in terms of mere possibility will not lift the case out of the area of uncertainty if the other evidence leaves the question speculative. * * *"

A practically similar answer to those of Drs. Chamberlain and Rush developed in the case of *Hutchison v. Aetna Life Insurance Co.*, *supra*, where an expert witness, Dr. Smith, at the conclusion of a hypothetical question was asked:

" 'Assuming those to be facts, Doctor, would you say that the accident was the probable cause of his

death?' to which he answered, 'Well, from a medical and surgical standpoint, it strikes me that this whole thing which was the active cause of this was an accident which the man had.' * * *" (p. 645)

"Without further discussing the character of Dr. Smith's answer, we agree with plaintiff's counsel that the answer was 'indefinite,' 'quite worthless,' and that it 'does not mean anything.' His testimony, in this respect, was wholly devoid of probative value or force." (p. 649)

In *Wintersteen v. Semler*, 197 Or. 601, 250 P. 2d 420, 255 P. 2d 138, a lengthy malpractice case wherein plaintiff claimed a lung abscess to be the result of defendant's negligence, the court made the following pertinent remarks which Appellants feel to be applicable to this case:

"So, in the instant case the only known or proved fact is that plaintiff had an abscess, and, to arrive at the conclusion that such abscess was caused by the improper position of plaintiff on her back, Doctor Tuhy had to indulge in the several inferences hereinbefore set out. It is well known that a person may suffer an abscess from various causes, and to say that plaintiff's abscess was caused in the manner delineated by Doctor Tuhy would be pure conjecture and highly speculative." (p. 614)

"To establish proximate cause, plaintiff relies entirely upon the testimony of Dr. John E. Tuhy * * *. It is manifest from the record that if Dr. Tuhy's testimony is insufficient as a matter of law to warrant the submission of the question of proximate cause to the jury, plaintiff's cause of action against defendant must fail.

"* * * Although we must and do assume as true all facts to which Dr. Tuhy testified, we are not required to, nor do we, assume the correctness of any of his conclusions or opinions unless they are

based upon substantial evidence in the record." (p. 621)

"* * * Considering his prior replies and the foundation upon which they were based, is it not manifest that his opinion as to what was 'very likely' or 'probable' constituted but a mere guess on his part and is purely speculative.

"12, 13. An opinion of a medical expert that a result is 'probable' or 'very likely' presents no question for jury determination, unless it is based upon facts and, in the light of all the evidence in the case, is reasonably sustainable. * * *" (p. 629)

"* * * It is obvious from the record that Dr. Tuhy's deduction was based upon an erroneous premise, a premise which finds no substantial support in the evidence. As we point out in our former opinion and as further demonstrated herein, Dr. Tuhy's opinion was purely speculative." (p. 635)

While Appellants objected to the questions propounded Dr. Chamberlain and moved to strike his testimony, the rulings of the court thereon have not been assigned as error for the reason they involved the questions here raised. In *Storla v. S., P. & S. Trans. Co.*, 136 Or. 315, 297 P. 367, 298 P. 1065, the court stated at page 320:

"Even though the rules of evidence may have failed to exclude the conjectures, speculations, or notions of the witnesses, and such incompetent testimony thereby gained its way into the record, yet the party who produced it will not become entitled to a judgment based upon it, because the substantive law requires that findings must be substantiated by evidence which establishes the needed facts: Wigmore on Evidence (2d ed.), § 663; *Goldfoot v. Lofgren*, 135 Or. 533 (296 P. 843)."

There is no competent substantial evidence in the entire record, direct or circumstantial, to support the court's finding of an accidental discharge of the shotgun which preceded and precipitated the onset of the fatal heart attack and such finding can only be based on conjecture and speculation and basing inferences on inferences contrary to Oregon law. ORS 41.330; *McKay v. State Industrial Accident Commission*, 161 Or. 191, 87 P. 2d 202; *Wintersteen v. Semler*, *supra*. In *Vale v. State Industrial Accident Commission*, 160 Or. 569, 86 P. 2d 956, the court stated at page 576:

“Possibilities are not enough; the law requires reasonable probability: (citing cases). Evidence must be substantial in order to carry conviction, and neither jury nor judge are justified in drawing conclusions when the essential facts are left to speculation. That, also, is true of expert witnesses: *Frint v. Amato*, 131 Or. 631, 647, 284 P. 183.”

And in *Lippold v. Kidd*, 126 Or. 160, 269 P. 210, the court stated at page 177:

“Difficulty in establishing a fact should not prompt a court to dispense with proof and impose a liability upon one who did not inflict the injury.”

In view of the restricted nature of this assignment of error, and in an effort to avoid repetition, Appellants have set forth in sub-section (B) the detailed conjecture and speculation, and the pyramiding of inferences on inferences in which Drs. Chamberlain and Rush indulged to arrive at their “opinions,” as well as the equally probable precipitating causes of the fatal heart attack, as such factors incorporate the corollary issues raised on this appeal. However, reference is made thereto for the

purpose of testing the sufficiency of the doctors' "opinions" to constitute competent substantial evidence in the event this court holds the quoted testimony as establishing an accidental discharge of the shotgun prior to the onset of the fatal heart attack.

Appellants contend Dr. Chamberlain's and Dr. Rush's "opinions" fail to raise to the dignity of competent substantial evidence and fail to constitute any proof, an accidental discharge of the shotgun preceded and precipitated the insured's fatal heart attack. The lower court itself, during the trial of this case, correctly stated:

"We do know that the shotgun blast was discharged. Now, whether it was before or after the seizure, we are left to speculate * * *" (R. 378).

and Appellants submit the court erred in finding an accidental discharge of the shotgun preceded and precipitated the insured's fatal heart attack.

B. There is no competent substantial evidence an anguish and pain reflex from the discharge of the shotgun solely and independently of all other causes resulted in the insured's death.

The known fact in this case is that the insured died as a result of a fatal heart attack. The question here presented is whether there is any competent substantial evidence that an accidental discharge of the shotgun created an anguish and pain reflex which, solely and independently of all other causes, was the probable cause of the insured's fatal heart attack.

The Opinions

The net effect of the "opinions" of Dr. Rush and Dr. Chamberlain was, as the autopsy findings failed to reveal any derangements within the heart which could precipitate a fatal heart attack, some outside factor was required and that an anguish reflex, coupled with some pain reflex, from the discharge of the shotgun could precipitate a cardiac arrhythmia, medical shock and death.

Dr. Chamberlain testified it was not common for an emotional or anguish reflex to produce a chain of events resulting in death, in the absence of disease or some physical infirmity (R. 273-275, 304), nor do superficial injuries commonly result in death (R. 305).

Dr. Rush testified the superficial injuries could not have resulted in death (R. 479) and, in the absence of disease, an emotional reflex was not a common cause of death (R. 436-439) and admitting during the entire practice of his specialty he had never certified an emotional reflex to be the sole cause of death (R. 478). During the course of Dr. Rush's deposition he described such an occurrence to be a "very, very rare thing" (R. 450-451, 477-478).

As Dr. Chamberlain and Dr. Rush testified the insured possessed a normal heart for a man in his age category, their "opinions" as to the precipitating cause of death fall in the realm of "medical rarity" and corroborate the "opinions" of Drs. Hunter, Watts and Wilson to the effect that an anguish reflex coupled with the infliction of superficial injuries such as sustained by the insured would not result in death (R. 520-521, 555-556,

581). Dr. Rush likewise so testified during the course of his deposition (R. 476-477).

All medical experts concurred that there are too frequent occurrences of individuals suffering fatal heart attacks notwithstanding negative case histories and normal cardiac tests performed shortly prior to death (R. 583), and individuals can have a fatal heart attack without any pathological findings on autopsy (R. 486, 520).

The "opinions" of Dr. Chamberlain and Dr. Rush must be scrutinized in light of their answers on cross-examination and be analyzed to ascertain whether they are based on conjecture and speculation and not a conclusion resulting from a process of basing inferences on inferences. The most illuminating testimony as to the deficiency of the "opinions" to constitute competent satisfactory evidence is that of Dr. Rush on cross-examination wherein he testified:

"Q. Doctor, on your direct examination you took into consideration the negative findings of Dr. McBride's cardiac tests and his E.K.G.'s; as a matter of fact, Doctor, doesn't it quite often happen that an individual is examined to determine if he has a heart condition, say for insurance purposes or just a periodic check-up, and an electrocardiogram is taken, the usual cardiac tests are given, all of which are negative, and then the individual dies shortly thereafter?

A. That has happened, yes, sir.

Q. And in such cases after an autopsy is performed, isn't one of the common causes that are revealed is a coronary sclerosis?

A. I think that would be a correct statement, but I don't know as to how frequently sclerosis will be the only finding, and of course it would depend upon the amount of the arteriosclerosis, and I be-

lieve some of these—there you will find that there has been several of them that were only small degrees.

Q. And in some of the cases there is no knowledge of any (479) condition of the heart; isn't that correct?

A. Yes, sir.

Q. Now, if that is true, Doctor, you can't rule out the possibility that that couldn't occur in this case?

A. I think that is correct, sir, that you cannot rule it out.

Q. And if Mr. Lyons suffered a heart attack prior to the discharge of a shotgun, you would be sure that was how this affair occurred?

A. Yes, sir, if I knew that I would feel definitely that that was correct.

Q. And, Doctor, from the autopsy report, you do of your own knowledge know that there was some involvement of the coronary arteries and some involvement of the aortic valve?

A. I think that is correct, there is recorded an anatomical description of it, but I do not know that there was any involvement that would be physiologically significant.

Q. My question is that the autopsy revealed that there was some involvement.

A. Yes, sir, there was some involvement, but still in explanation of it, I don't believe that one can interpret that that functionally was not active.

Q. And you do not have knowledge of your own as to the extent of the involvement, do you?

A. Only from the description.

Q. If that involvement was extreme, say, a 90-per-cent (480) involvement of the caliber of the coronary arteries, then your opinion would be that that condition was the direct cause of his death; would it not?

A. Yes, it would, yes, sir, finding there was that much involved, I would certainly say that.

Q. Then, Doctor, not knowing the extent of the

involvement of the coronary arteries and aortic valve, in giving your opinion as to the cause of death, you have sort of weighed in your own mind what the Mexican doctors meant by the use of certain words in their findings; isn't that true?

A. I assumed that the Mexican doctors meant that originally with the description that I thought was present that there was enough involvement to functionally be important. It's been my opinion since having it explained by another Mexican, who has had some knowledge of pathology himself, that it was the same type of findings we would find in many people of that age group that Mr. Lyons was. I just had to change the opinion of what I originally thought that they meant. * * *

Q. But, Doctor, you were required to speculate upon what they meant by their terminology in the report as to the extent of the diminishment of the caliber of the coronary arteries; were you not?

A. I think that that is a true statement, except I would, again, to explain, would expect anybody doing a pathology to have stated that there was a distinct decrease, if there had been a very marked diminishment." (R. 485-489)

The Autopsy Report

Dr. Rush and Dr. Chamberlain in assuming that an outside factor would be required to precipitate the fatal heart attack, ignore the findings revealed by the autopsy report, admitting, however, an aortic insufficiency is an accepted medical cause of a slight hypertrophy of the left ventricle (R. 273, 442); that a narrowing of the coronary arteries from atheromatous deposits can precipitate a fatal heart attack, was a possibility in this case and could not be ruled out (R. 486); and that a gall bladder reflex could precipitate a fatal heart attack (R. 400, 446). These doctors rule out these abnormalities

because the autopsy surgeons did not designate the diminishment of the caliber of the coronary arteries and in the absence of a finding concerning an abnormality in the cystic duct the gallstone could not have passed through (R. 449-450).

Dr. Rush and Dr. Chamberlain conclude the autopsy surgeons were "incompetent" to determine the cause of death and lacked necessary microscopic equipment to perform an adequate autopsy (R. 489). If we accept the premises of Drs. Rush and Chamberlain that the autopsy doctors were amateur pathologists incapable of predicating an opinion as to the cause with the viscera before them and their specific findings of abnormalities are incompetent and of no medical significance, then plaintiff must accept the corollary premise there is no competent evidence a coronary occlusion, a coronary thrombosis or a myocardial infarction did not exist. If the autopsy surgeons were incompetent for one purpose, they must be considered incompetent for all purposes. The fact the autopsy report is silent as to whether or not there was a coronary occlusion or myocardial infarction fails to constitute satisfactory evidence such conditions were not present, which fact was assumed by the doctors in their "opinions" and which usually result in the manifestations shown by the insured during his fatal heart attack (R. 377, 392, 394-395, 404, 407, 409-410).

Chest Pain

Exhibit 18 establishes as a fact the insured suffered attacks of constricting chest and arm radiation pains on February 3 and 4, 1953. Dr. McBride prescribed nitro-

glycerin to be taken on the onset of pain and noted on February 5, 1953, "pain imp." Dr. McBride cautioned Mr. Lyons against "tramping around fields," the very activity the insured was engaged in at the time of his fatal heart attack, as the insured's underarm pain was a brand new symptom (Ex. 2). It was admitted by all medical experts that constricting chest and arm radiation pains are to be considered as "angina pectoris" until proven otherwise and if nitroglycerin relieves such pains the patient has true angina pectoris. Drs. Chamberlain and Rush assume the noted pains to have been from "fatigue." However, Dr. Chamberlain testified:

"The symptoms, in other words, of fatigue differ from the symptoms of coronary pain very strikingly, which an expert, of which actually, second- or third-year medical students are taught to make the differentiation of." (R. 147)

and that the commonest type of fatigue pain is an "aching type" (R. 284). Dr. Chamberlain unwarrantedly assumed the nitroglycerine was prescribed for diagnostic purposes (R. 281) and Dr. Rush unwarrantedly assumed the pain was a continuing one for three days (R. 483-484). Contrasted against these unwarranted assumptions is the inescapable fact the insured had "attacks" of chest and arm radiation pains, nitroglycerine was prescribed to be taken on the "onset of the pain" and the following day Dr. McBride noted "pain imp." If nitroglycerine will not relieve "fatigue" pain, Dr. McBride's record affirmatively establishes as a fact the chest pains resulted from attacks of angina pectoris.

Exertion

The most common precipitating cause of attacks of angina pectoris and death is exertion (R. 274, 485). Drs. Rush and Chamberlain rule out exertion as a precipitating cause based on the physical activity engaged in by the insured the day prior to the fatal heart attack and the exertion of walking on the day of the insured's death. However, we are left to speculate as to the exertion expended by the insured during the 10 to 15 minutes prior to the fatal heart attack (R. 418). The known fact is that he moved 30 yards and retrieved 4 doves (R. 181, App. B, p. 65). Whether he ran or walked we are left to speculate, but Appellants are of the opinion exertion cannot be ruled out by the doctors as a basis of their "opinions."

Time Element

In arriving at their "opinions" Drs. Rush and Chamberlain place considerable emphasis on the time element between certain clinical manifestations dealing in "seconds." As one of the important factors of Dr. Chamberlain's "opinion," he assumed the pulmonary edema developed in "a few minutes" and on cross-examination testified pulmonary edema would not manifest itself at under "3 minutes" (R. 306). Dr. Rush's estimate, on cross-examination, was that the pulmonary edema manifested itself in a maximum of 90 seconds (R. 409-415). The fallacy of using the "guesses" or "estimates" of Dr. Rush as "facts" upon which to predicate an "opinion" the shotgun was discharged prior to the onset of the fatal heart attack is illustrated by the following question and answer:

“Q. Well, from the time elements you have given me, Dr. Rush, from the shot to the stertorous breathing, you said five to ten and not over twelve. Now, something must have occurred prior to that shot to cause the stertorous breathing if it cannot develop within less than 20 seconds, is that correct?

A. All I can tell you is the way I saw these things and the way it appeared to me.” (R. 422)

Appellants submit that if such “estimates” constitute “facts” then the only proven “facts” in the record are that the onset of the fatal heart attack occurred prior to the discharge of the shotgun.

Ventricular Fibrillation or Cardiac Arrhythmia

Dr. Chamberlain assumes the insured had ventricular fibrillation because he died (R. 290). He testified:

“* * * there were several things in this situation which could have produced ventricular fibrillation” (R. 289).

and admitted it might be precipitated by an underlying heart disease of a coronary nature which is probably a predisposing factor in any given case or which may be a precipitating factor in any case (R. 287). Dr. Rush testified:

“Q. Now, is it your testimony, Doctor, that an emotional upset and the infliction by the superficial injuries to the face will solely and independently of all other causes result in death?

A. No; I didn't state that.

Q. Pardon me?

A. I don't believe I ever stated it that way.

Q. I am asking you if you so state—will you read the question?

A. No; I didn't so state. (425)

(Question read.)

A. And I answered I didn't so state, nor would I so state now.

Q. Well, what is the net effect of your statement that there was an explosion, the reflexes and go through to the terminal point of death, isn't that the same question, practically?

A. No; I wouldn't think it was because many people can have a superficial wound and can have an explosion and would not have an arrhythmia that would follow it, wouldn't have shock, wouldn't have congestive failure. *Those other things had to follow those initiating chain of events whatever initiated the chain of events.* In fact, if you are going to use one thing on this as the most likely way to express it, but I—what I thought it would be, the arrhythmia produced the death. I merely thought the other things caused the arrhythmia." (R. 436-437) (Emphasis supplied.)

Inferences

The only established fact was the insured died of a heart attack and to arrive at the conclusion the heart attack was caused by an accidental discharge of the shotgun the following inferences must be indulged in:

(1) That the discharge of the shotgun preceded the onset of the fatal heart attack.

(2) That the discharge of the shotgun was capable of creating an emotional trauma or anguish reflex coupled with a pain reflex.

(3) That the emotional trauma or anguish reflex and pain reflex precipitated a ventricular fibrillation and cardiac arrhythmia incompatible with life.

(4) That although an emotional trauma or anguish reflex coupled with a pain reflex will not commonly pre-

cipitate a ventricular fibrillation or cardiac arrhythmia incompatible with life, in the absence of some bodily infirmity or disease, however, in this instance, said reflexes solely and independently of all other causes resulted in the insured's death.

Equally Probable Causes

(1) That although there are too frequent occurrences of individuals suffering fatal heart attacks notwithstanding negative case histories and normal cardiac tests having been performed shortly prior to death, that such did not occur in this case.

(2) That although the autopsy report revealed there was a derangement within the heart, the pathological findings could not have precipitated the fatal heart attack.

(3) That the insured's chest pains of February 3, 4 and 5, 1953, were not attacks of angina pectoris.

(4) That although an attack of angina pectoris could have precipitated the fatal heart attack, and was a possibility, such did not occur in this case.

(5) That although exertion is a more common precipitating cause of a fatal heart attack, the insured was not engaged in exertion.

(6) That although a viscus reflex from a gall bladder attack can precipitate a fatal heart attack such did not occur in this case.

(7) That although a coronary occlusion or myocardial infarction could have precipitated the fatal heart attack such did not occur in this case because the autopsy report did not incorporate a finding of those conditions.

(8) That although there are numerous factors which can precipitate cardiac arrhythmia and ventricular fibrillation an emotional or anguish and superficial pain reflex was the more probable precipitating cause of the fatal heart attack.

Authorities

The basing of inferences on inferences is prohibited by O.R.S. 41.330, and in *McKay v. State Industrial Accident Commission, supra*, a complete discussion of basing an inference upon an inference may be found. In that case the decedent received an electric shock. Thereafter on proceeding home his car left the pavement, he was thrown to the pavement, and died. It was the theory of plaintiff that McKay's death was due to heart failure as a result of heart fibrillation induced by electric shock and the court stated:

"1, 2. Without the testimony of medical experts as to the probable cause of death no one, we apprehend, would contend that any of the numerous possible causes presented could be seized upon as more likely than another. But, as we view it, the expert testimony does not make the case any stronger. We have recently held that the rule which forbids a jury to speculate on the cause of a death or injury applies also to the opinion evidence of medical experts: *Leona May Vale v. State Industrial Accident Commission*, 160 Or. 569, 86 P. 2d 956. The testimony of Dr. Erwin and Dr. Coe that McKay's death was due to an injury to his heart has only one possible basis, and that is the fact that the man died. Without that there is no evidence whatever from what such an injury can be found, and the doctors did not claim that there is. All that could be definitely known about the decedent was that he had received an electric shock and that he died in an automobile

accident a few hours later. But the cause of death was the question at issue, and in whatever form of language the experts might choose to clothe their opinions they necessarily arrived at them by assuming as a fact the very thing that was in dispute. In other words, they reasoned that because McKay sustained an electric shock he came to his death, and because he died the electric shock must have produced an injury to his heart capable of causing death or a collapse. This is not reasoning from cause to effect; it is reasoning in a circle.

"We therefore agree with Dr. Erwin that to assume that electric shock was the cause of McKay's death is assuming a great deal, and that with respect to the question whether electric shock caused his automobile to go off the highway, 'it is just as easy to assume one thing as another.' * * *

"3, 4. In this state the doctrine that an inference may not be based on an inference is a creature of statute: § 9-804, Oregon Code 1930. It has been applied in a number of cases, among which may be mentioned: *State v. Hembree*, 54 Or. 463, 103 P. 1008; *Lintner v. Wiles*, 70 Or. 350, 141 P. 871; *Stamm v. Wood*, 86 Or. 174, 168 P. 69; *Deniff v. Charles R. McCormick & Co.*, 105 Or. 697, 210 P. 703; *Hayes v. Ogle*, 143 Or. 1, 21 P. 2d 223." (p. 198-199)

"5. On the other hand, it is not permitted to assume a fact that has not been legally proved and on such an insecure foundation to build a conclusion. And so it is said in *State v. Clark*, supra, in explaining the basis of the decision in *State v. Hembree*, supra:

"'Each inference was a *non sequitur*, and had no foundation upon which to rest. This court refused to tolerate such a piling of inferences upon each other and pointed out that not even the principal fact upon which they were supposed to rest had been proved.'

"The instant case illustrates, in one aspect, an attempt to apply the rule improperly, and in another aspect, its right application. The circumstances in evidence on which the plaintiff relies to prove that the decedent sustained an electric shock are 'so related to each other that it would be illogical to assume that they could all exist coincidentally and the fact in dispute be nonexistent.' But the conclusion that the decedent's death was caused by electric shock is based on the inference that the shock caused an injury to his heart capable of producing death. That, as this court said with reference to the evidence in the *Hembree* case, is a *non sequitur*. There is no evidence of injury to the decedent's heart. It is a mere possibility lacking proof, and this possibility is necessarily the foundation of the plaintiff's claim, and so the case is exactly like *State v. Hembree*, *supra*, and the other cases decided by this court where evidence has been held insufficient or inadmissible because it consisted of inferences based on inferences.

"It could as well be said that, as between two possible causes of decedent's death, no evidence has been produced which makes one cause appear as more probable than the other, or enables the triers of the facts to do other than guess at the solution of the mystery. In that situation the plaintiff necessarily must fail." (p. 200-201)

In *Wintersteen v. Semler*, *supra*, the court stated at page 612:

"It is urged that the only established fact or the fact proved was that plaintiff had an abscess, and that to arrive at the conclusion that such abscess was caused by plaintiff's position on her back, the following inferences must be indulged in: (1) that foreign matter got into plaintiff's trachea; (2) that such matter proceeded into plaintiff's lungs; (3) that such matter was infectious, and (4) that such infectious material caused the abscess. * * *

“So, in the instant case the only known or proved fact is that plaintiff had an abscess, and, to arrive at the conclusion that such abscess was caused by the improper position of plaintiff on her back, Doctor Tuhy had to indulge in the several inferences hereinbefore set out. It is well known that a person may suffer an abscess from various causes, and to say that plaintiff’s abscess was caused in the manner delineated by Doctor Tuhy would be pure conjecture and highly speculative.”

When the facts are as equal with one theory as another and the defendant is liable for only one of them, the court is not permitted to engage in speculation and conjecture. In *Annereau v. Ewauna Box Co.*, 176 Or. 509, 159 P. 2d 215, the deceased was found dead in a fuel house partially covered with sawdust with an abrasion on his head. Plaintiff contended the deceased fell and struck his head and was smothered to death. An autopsy was performed which revealed no significant changes in the valves, muscles and blood vessels of the heart and the pathologist testified there was nothing about the heart condition which could have prevented the decedent from living a normal life. There was also evidence the man suffered from a pathological cardiac condition not revealed on autopsy. The court stated at pages 515-517:

“In the instant case, however, more than one chain of circumstances is in evidence. Appellant selects one, namely, that Wood was found dead, lying in the fuel house. His head was injured. His body was buried in sawdust, and some sawdust was in his mouth and nostrils. The conveyor chain was running empty. From these facts he deduces that decedent was suffocated by being buried in a collapse of fuel, and that most of the collapsed fuel was

afterwards carried off by the conveyor. Respondent, on the other hand, suggests that it is impossible, from the evidence, to deduce the cause of death with reasonable certainty. We are inclined to agree. There was evidence that the man suffered from a pathological cardiac condition, and the proof indicated that he died from suffocation produced by aspiration of vomit, which probably resulted from his heart condition. He may have fallen on the conveyor chain and injured his head and afterwards dragged himself into the position in which he was found. He was lying on, or in, a low ridge of fuel to the south of the conveyor, and the circumstances are susceptible of the deduction that he collapsed against this ridge, and that sawdust therefrom settled partially over his body. It is true that the vomiting may have resulted from pressure of sawdust, but it is at least equally probable that it resulted from heart failure. It would seem to be unlikely that the slight head injury was caused by sawdust falling upon the man, and much more likely that he fell and struck his head against the conveyor in falling.

“3, 4. The facts are as consistent with respondent’s theory as with appellant’s. The circumstantial evidence, with equal reason, might have supported two different conclusions respecting the proximate cause of Wood’s death, for one of which the respondent could not have been held liable. The jury, in our opinion, could, in any event, have found a verdict against respondent only by resorting to speculation and conjecture, in which the law does not permit them to indulge. We think that the trial judge ruled correctly in sustaining respondent’s motion for a judgment of involuntary nonsuit. (Citing cases.)”

In *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355, 153 P. 470, a case involving infection, the court stated at page 369:

"Now, from this testimony, which is wholly from plaintiff's witnesses, there may be drawn several inferences: (1) That the inflammation which ensued upon the 21st was a mere phase of an infection already shown to exist in the wound; (2) that it arose from plaintiff's activities around the race-track at Boise; (3) that it came from unsterilized dressings applied by Mrs. Simms before plaintiff's departure to Boise; or (4) that it arose from unsanitary condition existing in the jail at Huntington. There is no evidence which has a tendency to show from which of these causes the subsequent aggravated condition arose. * * * When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration: *Armstrong v. Town of Cosmopolis*, 32 Wash. 110 (72 Pac. 1038)."

In *Parker v. Pettit*, 171 Or. 481, 138 P. 2d 592, a malpractice case wherein recovery was awarded by the jury for loss of an eye, plaintiff's sole expert witness, Dr. Nelson, testified on direct examination that a gauze packing was the cause of the loss of the eye and that radium had nothing to do with it. On cross-examination, however, he admitted that radium could destroy the eye. The court stated at page 489:

"Has it been established with reasonable certainty that leaving the gauze packing in plaintiff's antrum was the cause of the loss of her eye? Or was such damage caused by the radium treatment? Defendant is not charged with negligence in administering the radium. He would not, therefore, be responsible for any damage to the eye by reason of the use of radium to kill the cancer. The evidence viewed in the light most favorable to plaintiff is that the loss of the eye might, with equal proba-

bility, be caused either by the gauze or radium. The testimony of Dr. Nelson concedes that such is true and the evidence on behalf of the defendant is that the gauze had nothing whatever to do with such damage. Under that state of the record the jury was left only to speculate as to that phase of the case. Hence the plaintiff was not entitled to the award of \$10,000 for loss of the eye and the court was right in eliminating such sum from the judgment."

It is axiomatic that no finding can stand that depends upon conjecture and speculation. *Lemons et al v. Holland et al.*, 205 Or 163, 284 P. 2d 1041, 286 P. 2d 656; *Quetschke, Adm'x v. Peterson and Zeller*, 198 Or. 598, 258 P. 2d 128; *Devine v. Southern Pacific Co.*, *supra*.

The mere fact that the insured's death followed an injury is not proof that death resulted therefrom. The connection between the two must be proven with reasonable certainty. *Hutchison v. Aetna Life Insurance Company*, *supra*.

Drs. Rush's and Chamberlain's "conclusions" are violative of the foregoing well enunciated rules of law. They assumed the very fact in issue, the discharge of the shotgun prior to the onset of the fatal heart attack to arrive at their "opinions" as to the physiological chain of events resulting in death. The doctors engaged in speculation and conjecture and based inferences on inferences. The additional deficiencies of their "opinions" as enunciated in argument (A) are incorporated herein. Such testimony does not constitute substantial evidence upon which the court could predicate its findings an

accidental discharge of the shotgun inflicted bodily injuries which solely and independently of all other causes occasioned the insured's death.

C. There is no competent substantial evidence the death of the insured was not caused or contributed to by disease.

Dr. Rush in his affidavits (App. B, pp. 56-62) and on deposition testified that the insured had a "diseased" condition of the heart, without which an anguish and pain reflex would not have resulted in the insured's death (R. 477). On trial he testified to the effect the insured possessed a normal heart for a man in his age category (R. 359) by engaging in speculation and conjecture (R. 487-489). On cross-examination he testified:

"Q. Well, you certainly have a conclusion as to whether or not a diseased condition of the heart contributed to the heart's death?

A. I think his heart did contribute to the death.

Q. Did a diseased condition of his heart contribute to his death?

A. Depends upon what you mean. It is not a heart that is perfect." (R. 465)

Dr. Chamberlain testified to the effect the insured possessed a normal heart for a man in his age category (R. 252) by engaging in speculation and conjecture (R. 266, 271, 312). His testimony to the effect that an abnormal rhythm is more apt to develop in the heart as a result of some underlying disease (R. 229) and an emotional factor would not precipitate coronary insufficiency unless there was something else physically which inter-

vened (R. 274-275), infers a diseased condition existed in the insured's heart.

Such "opinions" fail to constitute substantial evidence to support the court's finding the insured's death was not caused or contributed to by disease.

CONCLUSION

Appellants submit there is no competent substantial evidence to support the trial court's findings of fact V and VI. Appellee's judgments should be set aside and judgments entered in favor of Appellants.

Respectfully submitted,

R. E. KRIESIEN,
RAY MIZE,
Attorneys for Appellants.

MEINDL, MIZE, & KRIESIEN,
1431 American Bank Building,
Portland 5, Oregon,
Of Counsel.

APPENDIX A**TRANSLATION**

RAMON CASTRO GULUARTE, Delegate of the Southern Territory of the Lower California, acting as Officer of the Civil Registry in the jurisdiction of San Jose del Cabo,

CERTIFIES:

That in Book number one of Death Records of the year 1953, pages 3, 4 and 5 there is written the following minute: ON THE MARGIN:—Number five.—Death of Mr. James A. Lyons.—AT THE CENTER: In the port of San Jose del Cabo Southern Territory of the Lower California, at eleven 11 o'clock february 12, 1953, I Ramon Castro Guluarte, Government Delegate, acting as Officer of the Civil Registry, received the communication number 30, file A.-3.-7.-(7) 953 of the same date, issued by the Prosecutor reading as follows: "Pursuant to prior proceeding carried out by this Office under my charge, concerning the case of a man of Northamerican nationality who was found dead on the lands called "Los Llanos" of this Jurisdiction, a resolution reading as follows was issued: San Jose del Cabo, B.C., February 12, 1953, the Prosecutor, acting in his capacity, attested by the witnesses resolved: that inasmuch as the denunciation made by telephone by the Subdelegate of the Government at Cabo de San Lucas Mr. Fausto Peralta Banaga after having found dead in "Los Llanos" a man of North-american nationality and according to the Doctor Certificate issued by Dr. Armando Serrano Anaya and Dr.

Eduardo Rodriguez Cota who practiced the autopsy on the body of a man who was called James A. Lyons, a Northamerican national, which established that the corpse was examined and that the death was due to an aortic insuficiency which caused a suden cardiac fatigue having found also ateromatic plates in the coronaries. In view of the above and prior to the identification of the corpse and with the transcription of the present resolution send a communication to the Judge of the Registry of this town to the effect that a minute by inserted in the Book of Death records of this year, for which purpose description of the deceased are hereby given, according to the identification of the corpse, as follows: James A. Lyons, Northamerican national, married, fifty years of age, his wife is Jane Lyons, residence: Smore Treeranch, Palm Springs, California, U.S.A.—This transcription, attached to the Doctor Certificate, which is to be returned, has to be inserted in the correspondent minute".—The Doctor Certificate is as follows: The undersigned, Medical Doctors and Surgeons, legally authorized to practice medicine and having being requested according to Articles two hundred twenty and two hundred twenty one of the Organic Law of the Court of Justice of the District and Federal Territories to practice the legal autopsy on the corpse of Mr. James A. Lyons, hereby Certify: "that the death was due to an aortic inssuficiency which caused a suden cardiac fatigue having found also ateromatic plates in the coronaries". At the request of Mr. Robert J. Parrick we issue this Certificate at Villa de San Jose del Cabo. B.C. on the 11th of February year nineteen fifty three.—Signed, Dr.

Armando Serrano A, signed, Dr. Eduardo Rodriguez C. signed, Alberto Cesena Dodero, Prosecutor. According to Article 122 of the Civil Code the insertion is hereby made.—The Delegate of the Government acting as Officer of the Civil Registry, Ramon Castro Gluarte. Ilegible signature.

This is an exact copy of the original which is issued at the request of Mr. Robert J. Parrick, at the port of San Jose del Cabo, Southern Territory of the Lower California, on February twelve nineteen fifty three.

(a seal of the
Civil Registry)

The Delegate of the Government
acting as Officer of the Civil Reg.

By, Ramon Castro Guluarte
(ilegibly signature)

APPENDIX B

PROOF OF DEATH

Statement of Beneficiary by Authorized Attorney

STATE OF OREGON)
) ss.
 County of Multnomah)

I, ROBERT F. MAGUIRE, being first duly sworn, on oath, depose and say that I am the attorney at law for Jane S. Lyons, the beneficiary under the within described policies and certificates; that I am duly authorized by said Jane S. Lyons to make this proof of death on her behalf and that the following proof of death is true as I verily believe:

The name of the deceased, insured under the within described policies, was James Alexander Lyons who resided at Coos Bay, Oregon, whose occupation was lumberman and who was born December 30, 1904 and who died February 10, 1953 at Los Llanos, Lower California, Republic of Mexico. This proof of death is furnished in connection with certificate Nos. 0-5058-1 in the principal sum of \$25,000.00 and O-OM-C-1740 in the principal sum of \$75,000.00, issued by Underwriters at Lloyd's, London. The beneficiary thereunder is Jane S. Lyons, widow of said James Alexander Lyons and who was born January 8, 1914, residing at Coos Bay, Oregon.

The death of said James Alexander Lyons occurred on the date and at the place above mentioned as follows: while hunting doves his shotgun accidentally fired caus-

ing powder burns and wounds upon the neck and face which produced shock and an angina and an anoxemia of the ventricular muscles of the heart producing a ventricular flutter or fibrillation which ended in death.

The cause of death was an accidental discharge of the shotgun causing burns and wounds of the neck and face which precipitated an acute angina with some coronary occlusion and ventricular fibrillation resulting in death.

At the request of the Underwriters there are attached hereto the following documents:

1. Photostatic copy of certificate bearing the seal of the Civil Registry of San Jose del Cabo, Southern Territory of Lower California, Republic of Mexico, together with three copies of translation thereof;

2. Photostatic copy of document in Spanish bearing seal of "Delagacion Sanitaria, San Jose del Cabo, Lower California, Republic of Mexico" and bearing the signatures of Dr. Armando Serrano A. and Dr. Eduardo Rodriguez C., and which apparently is an autopsy report concerning James Alexander Lyons;

3. Three photostatic copies of document in Spanish which apparently is a resumé or certificate of inquest conducted by Mexican authorities together with three translations thereof;

4. Three copies of affidavit of Rosa M. del Paso relating to her translation of said documents.

There are also attached hereto:

1. Affidavit in triplicate of Dr. Homer P. Rush, specialist in internal medicine, with particular attention to diseases of the heart, an eye witness to the death of said James Alexander Lyons dated March 31, 1953;

2. Affidavit in triplicate of said Dr. Homer P. Rush dated July 10, 1953.

/s/ Robert F. Maguire

Subscribed and sworn to before me this 13th day of
October, 1953.

SEAL

/s/ Lillamae Wentz

Notary Public for Oregon

My Commission Expires: Feb. 13, 1954

HOMER P. RUSH, M.D.—MATTHEW C. RIDDLE, M.D.
Physicians

919 S. W. Taylor Street — Portland 5, Oregon
Broadway 0168

STATE OF OREGON)
COUNTY OF MULTNOMAH) ss.

I, HOMER P. RUSH, being first duly sworn, upon oath depose and say: That I am a regularly licensed physician under the laws of the State of Oregon, and my offices are in the city of Portland therein; that I have been actively engaged in the practice of medicine for over 25 years; that I have, for many years, specialized in internal medicine and diagnosis, with particular attention to the diseases of the heart; that I am, at present, Clinical Professor of Medicine, Head of the Section

of Cardiology, in the University of Oregon Medical School.

That I knew, and was acquainted with, James A. Lyons, (sometimes known as James Alexander Lyons) and was present at the time of his death on February 10, 1953. On the morning of that day, in his company, and that of several others, I had been driven upon the beach above the seashore near the village of San Marco, which is near La Paz, Baja California, Mexico, to hunt doves. I was a few yards distant from him at the time his shotgun was discharged. Shortly thereafter, I heard groans, or more accurately, stridulous breathing coming from where he had been standing and I proceeded immediately to the spot, finding him prostrate and lying partially under a large bush. I turned him over and found that the gun, in its discharge, had powder burned his face, which was bleeding from slight lacerations probably caused by one or more shot pellets or wadding when the gun was discharged. He was cyanotic and pulseless. He expired in some five to ten minutes. I have talked with Drs. Armando Serrano Anaya and Eduardo Rorigues Cota who performed the autopsy on the body of said James A. Lyons.

From my own observations made at the time of his death, which are corroborated by the autopsy report, I certify that James A. Lyons had an underlying coronary artery disease and that when the shotgun was discharged, the explosion and concussion produced a shock which precipitated an acute angina, causing some coronary occlusion and a sudden ventricular fibrillation of

the heart which caused his death within five to ten minutes after the accidental discharge of the gun in close proximity to his face.

/s/ HOMER P. RUSH, M.D.

SUBSCRIBED AND SWORN to before me this 31 day of March, 1953.

SEAL

/s/ FRANCES LEE DIEKMEIER
Notary Public for Oregon
My Commission expires: 8-4-54

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

I, HOMER P. RUSH, being first duly sworn, upon oath depose and say: That I am a regularly licensed physician under the laws of the State of Oregon, and my offices are in the City of Portland therein; that I have been actively engaged in the practice of medicine for over 25 years; that I have, for many years, specialized in internal medicine and diagnosis, with particular attention to the diseases of the heart; that I am, at present, Clinical Professor of Medicine, Head of the Section of Cardiology, in the University of Oregon Medical School.

That I knew, and was acquainted with, James A. Lyons (sometimes known as James Alexander Lyons), and was present at the time of his death on February 10, 1953. On Monday, February 9, 1953, we were cruising down the Gulf of Lower California on the peninsula side. That afternoon a large marlin was hooked, Mr. Lyons had the rod and went through reasonably severe

physical exertion for some fifteen to twenty-five minutes. I was sitting and standing by him during this entire episode. I noticed no evidence of dyspnea, cyanosis or other signs or symptoms which might suggest heart strain. He did not complain of any pain or discomfort, and appeared to be in good health.

When we anchored in the harbor at San Lucas, the port captain name unknown and ship broker, Senor Ruiz, came aboard. Because they told us of the excellent dove hunting which was available, we arranged to meet Senor Ruiz and go dove hunting the next morning. We arose about 6:00 a.m. on February 10, 1953. Mr. James Lyons, Mr. Robert Parrick, Doctor Francis Chamberlain and I went ashore. We took a shotgun (12 gauge Magnum) and a .22 rifle from the ship. We also had available a 12 gauge shotgun and a .22 rifle that belonged to the Mexicans. We drove through the village of San Lucas in Senor Ruiz' car, stopped and picked up his 10 or 12 year old son who accompanied us and drove several miles into the country, being back about a mile or so from the seashore. The country was brushy and filled with small trees. We parked alongside the road.

Mr. Robert Parrick took Senor Ruiz' shotgun, Mr. James Lyons used the shotgun from the ship, Senor Ruiz used his .22 rifle and I used the .22 rifle from the ship. Doctor Francis Chamberlain elected to walk back through the village to take pictures as there were no more guns available. We started to hunt about 7:30 a.m. The morning was beautiful; the landscape attractive. Mr. Lyons and I talked for several minutes about how nice it was to be alive on such a beautiful morning.

He was in the best of spirits and seemed physically fit. We had taken a short stroll up a side path looking at the vegetation.

Doves began to come over and he had shot 3 or 4 birds when we were together. It was obvious that he was very familiar with firearms and very careful in his manner of handling a gun. He shot one dove that fell behind a ridge and Senor Ruiz left us to retrieve this dove. Having a rifle and being not too far distant from a tree in which doves were landing, I was placed in this position and Mr. Lyons was down the road and off to the side which seemed to be a good point in the flyway. I would estimate that he was some 50 yards from me. The morning was quiet and there was no extraneous noise. While waiting for doves to alight in this tree, I heard a shotgun explosion behind me coming from the direction where I knew Mr. Lyons was hunting. I turned around and saw a dove fall. This was followed almost immediately by a second shotgun explosion which I believe was not more than 10 to 20 seconds after the first gun explosion. I saw no bird fall from this second shot nor did I see any birds flying overhead. However, at that moment I did have my back turned towards the location where Mr. Lyons was standing. Within a matter of a very short time, I would estimate not over 15 seconds, I heard a peculiar stridulous wheezing noise from the direction of Mr. Lyons. This was distinctly at a later time element than the second shotgun explosion. My first reaction was "is this the noise of a mad dog or a wheezy bull" and as I walked down the road I wondered what I would do with a .22 rifle with such an animal. I then

saw Mr. Lyons lying under a low mesquite-like bush, face down with his gun beneath him and under his chest with the barrel extending several inches from the point of his shoulder on the left side. He was cyanotic, having marked difficulty with stridulous breathing and pulseless when I arrived by his side. As I approached this man I noticed blood on the right side of his face and called for help. Senor Ruiz arrived first within a few seconds, and Mr. Parrick and Senor Ruiz' son arrived a minute or so later. We rolled him over, tried to get a better position for breathing, he remained pulseless, and there was but a very small spot of blood on the ground and no great hemorrhage from the superficial wounds on his face and neck on the right side.

Following this accident, the ground and brush were carefully examined by the group of us and we could make out no evidence of soil displacement nor broken brush which could have resulted from the discharge of a shotgun.

I learned later this man had been checked over by Doctor William McBride of Palm Springs a day or two before this trip. He had been assured that his general status was good, that he was tired and probably needed a vacation. He had given such information in conversation to Doctor Chamberlain the night before.

The autopsy showed a coronary sclerosis.

It is my medical opinion that this man was in good physical condition the morning of this accident with no evidence of cardiac strain, nor had he been under any exertion or excitement that would have produced cardiac

strain previous to the explosion of the shotgun which caused the superficial wounds. It is my opinion that the second explosion of the shotgun which I have mentioned above was an accidental discharge of the shotgun, next to his face which, in addition to the wounds above mentioned, produced a marked emotional reaction that precipitated an angina which caused an anoxemia of the ventricular muscles of the heart producing a ventricular flutter or fibrillation which ended in death. It is further my opinion that had it not been for the accidental discharge of the gun above described he would not have suffered the angina and he would not have suffered the heart seizure and would not have died at that time.

It is my opinion that the sequence of events was:

- (1) accidental explosion of gun with superficial wounds of the right side of the face and neck which produced an angina followed by
- (2) ventricular arrhythmia which produced death.

In my opinion the sequence of events and the time elements involved therein eliminates any probability that the onset of the heart attack precipitated the accidental discharge of the shotgun; but, on the contrary, established with reasonable certainty that the second explosion of the shotgun precipitated the onset of the heart attack.

/s/ HOMER P. RUSH

Subscribed and sworn to before me this 10 day of July, 1953.

SEAL /s/ FRANCES LEE DIEKMEIER
 Notary Public for the State of Oregon
 My Commission Expires 8/6/54

Jose Prisciliano Cesena Cesena and Abel Green Manriquez, in their usual capacity of witnesses of the Public Ministry at San Jose—del Cabo, Southern Territory of the Lower California, hereby—CERTIFY:—That in file number 7 inchoated on February 10, 1953,—pursuant to prior investigation carried out due to the accidental death of the North American citizen Mr. JAMES A. LYONS, it—appears the following:

EVIDENCES:

On February 10, 1953 the Prosecutor was informed by telephone, by the Sub-Delegate of the Government at Cabo San Lucas, that on the same date, at 1 o'clock, a man of North American nationality was found dead at "Los Llanos" of this jurisdiction. On February 10, 1953, the undersigned, Prosecutor at San Jose del Cabo, Southern Territory of the Lower California RESOLVED:—To carry out an investigation, and in case of delinquency, denunciate it to the competent authorities.—To appoint Dr. Armando Serrano Anaya and Dr. Eduardo Rodriguez Cota, from Hospital Dr. Raul Carrillo of this town, to examine and practice the legal autopsy of the corpse, in order to determine the cause of the death.—According to Articles 1, 5 and 24 of the Organic Law and 21 of the Fundamental Ordinance, judicial formalities are to be performed at the place where the corpse was found, by the mentioned physicians and personnel of this Office.—Signed before witnesses, Alberto Cesena Dodero, Prosecutor.—Registered number 7 of the same date. On February 10, 1953, Dr. Armando Serrano was called by this Public Ministry to

examine, with Dr. Eduardo Rodriguez Cota, the corpse of the North American national who was found dead at "Los Llanos" of this jurisdiction.—In my presence and that of the witnesses, declared, under oath, the following:—To be named Armando Serrano Anaya, 28 years of age, Medical Doctor and Surgeon legally authorized to practice medicine, born at Mexico City, with address in this Port.—Having accepted his nomination, signed this minute before me, Prosecutor, and witnesses.—At the margine :—Dr. Armando Serrano Anaya, signature.—On the same date, Dr. Eduardo Rodriguez Cota, who was called by this Public Ministry to examine, with Dr. Armando Serrano, and practice the legal autopsy of the corpse of the North American national who was found dead at "Los Llanos" of this jurisdiction, declared: To be named as it is above stated, Mexican nationality, catholic, married, Medical Doctor legally authorized to practice medicine, 26 years of age, born at La Paz, B.C., with address in this Port.—Having accepted his nomination wigned this minute before me, Prosecutor, and attesting witnesses.—At the margine: Dr. Eduardo Rodriguez Cota, signature.—At the center: Alberto Ceseña Dodero, Prosecutor, signature.—J. Prisciliano Ceseña C, Witness, signature.—Abel Green M, Witness, signature.

In the fields calles "Los Llanos" at Cabo San Lucas, jurisdiction of San Jose del Cabo, Wouthern Territory of the Lower California at 10 o'clock, February 10, 1953, members of this Public Ministry and Doctors Armando Serrano Anaya and Eduardo Rodriguez Cota, —attested to have found a masculine body of North

American nationality, wearing blue trousers, gray shirt with short sleeves, gray socks and brown shoes. The body was laying on its right side from North to South, under some bushes near the road; the head over a sack, the arms outstretched ahead and the legs bent at the knees; rigor mortus had set in, specially around the face and neck.—At 3, 12 and 16 meters South the corpse, were found 4 dead doves. There was blood on his face and neck, but none on his body or on the ground. The body belonged to a man of about 55 years of age, strong build, white complexion, about 1.65 meters in height, abdominal perimeter 85 centimeters, thorax perimeter 93 centimeters, abundant gray hair, green eyes, flat nose, black eyebrows, normal size mouth, clean shaved.—The body was cold and rigid. Incrusted in the neck, right side of the fact, eye-lid and ear, were found gun-powder grains. In the right side of the forehead, near the hair line, was found a hold of about 1 milimeter in diameter. Also were found excoriations in the right arm and hand.—We attest to the above description.—The Prosecutor, Alberto Cesena Dodero, signature.—Witness, Jose Frisciliano Cesena C, signature.—Witness, Abel Green Manriquez.

Feb. 10, 1953.—Immediately after the above, the Prosecutor ordered to remove the corpse to Hospital "Dr. Raul Carrillo" at San Jose del Cabo, B.C., in order to proceed to its identification and legal autopsy that would be performed by Doctors Armando Serrano and Eduardo Rodriguez Cota.—To identify the corpse were called Dr. Homer P. Rush and the airplane pilot Robert J. Parrick.

San Jose del Cabo, B.C, February 10, 1953.—As Mr. Robert J. Parrick and Dr. Homer P. Rush do not speak Spanish, the Prosecutor ordered, according to Article 183 of the Penal Code, that their declarations be translated into the Spanish language by Mr. Manuel Galindo S, and Mr. Eduardo Ruiz Cassezus.

In my presence and before witnesses, Mr. Manuel Galindo called to translate into the Spanish language the declarations made towards the identification of the corpse, declared the following: To be named as it is above stated, Mexican nationality, catholic, married, Federal employee, 47 years of age, born at this town.—Having accepted his nomination, Mr. Galindo S. signed this minute before me, Prosecutor, and witnesses.—At the margine, M.Galindo S, signature—

On the same date, February 10, 1953, prior summon of this Public Ministry, the other interpreter declared to be named Eduardo Ruiz Cassezus, 47 years of age, Mexican nationality, catholic, married, merchant, born at this town.—Having being notified that the purpose of this citation was to translate into the Spanish language the declarations made towards the identification of the corpse, he accepted and signed before me, Prosecutor, and witnesses.—In view of the foregoing, the day record of proceedings is ended.—In witness whereof, I, Prosecutor hereunto set my hand.—Alberto Cesena Dodero, signature.—J.Prisciliano Cesena.—Abel Green M, witnesses, signatures.

San Jose del Cabo, Southern Territory of the Lower California,—February 11, 1953.—Congregated at Hos-

pital "Dr. Raul Carrillo" of this town, were members of the Public Ministry of San Jose del Cabo, witnesses, interpreters, Dr. Homer P. Rush and the airplane pilot Robert J. Parrick.—Dr. Rush, under oath to tell the truth, declared to be a North American citizen, catholic, married, 56 years of age, Medical Doctor, born at Omaha, Nebraska, U.S.A.—When asked for his passport, he said that he left it at the Yacht.—Questioned as to the identity of the corpse, he stated it to be a of man called JAMES A. LYONS, North American citizen, about 55 years of age, married, with address at Palm Spring, California, that they had met approximately a week before and became good friends.—He also informed that Mr. Lyons was co-owner of the Yacht in which they were traveling, and that he did not know his wife nor his parents, but was told by Mr. Lyons that he had 3 children and his wife's name is Jane Lyons.—As he was questioned about the events that brought about the present procedures, he replied that Mr. Robert J. Parrick, Mr. Lyons, Mr. Antonio Ruiz C., a Mexican boy and himself, went to Los Llanos on February 10, 1953 with the purpose of hunting doves. The deceased and Mr. Parrick carried 12 gauge shotguns, Mr. Ruiz and himself carried 22 caliber rifles.—Upon their arrival, each went in different directions. At approximately 50 feet distance, he heard two shots, and another shortly after followed by somebody crying out in pain. Supposing that something wrong happened, he immediately went to the place that the voices were coming from, and found Mr. Lyons under some bushes, unconscious and breathing difficult and desperately. As he

called for help, Mr. Ruiz arrived. While they were trying to help him, Robert and Antonio's son came. When they carried him from the bushes, they noticed that one side of his face was superficially wounded and bleeding slightly. He died about five minutes later.—Robert J. Parrick took off his shirt and covered Mr. Lyons' face to protect it from the sun. Antonio Ruiz went to notify the Cabo San Lucas authorities of the incident.—Dr. Rush's belief is that James Lyons' death was accidental, caused by the discharge of the shotgun he carried, and also certifies that he was happy and in good health before the fatal accident.—Latter on, the Sub-Delegate of the Government at Cabo San Lucas arrived, and after taking declarations, returned to Cabo San Lucas leaving a Policeman in charge.—This declaration was given by Dr. Homer P. Rush and translated by the interpreters.—After being read and approved, it was signed before me, Prosecutor, and the witnesses.—Homer P. Rush, M. Galindo S., Eduardo Ruiz C., (signatures).

Following act. — February 11, 1953. — Before the Prosecutor, attesting witnesses, and the interpreters Manuel Galindo S. and Eduardo Ruiz C., Mr. Robert J. Parrick, who was summoned by this Public Ministry to identify the corpse, declared under oath, to be a North American citizen, single, 36 years of age, airplane pilot, born at Twin Falls, Idaho, U.S.A., that he was visiting this country and had left his immigration document at the Yacht.—When questioned about the corpse, he declared it to be a man named JAMES A. LYONS, North American national, who was a very good friend of his and also his employer; the the deceased was married to

Jane Lyons, had 3 children, and lived at Smoretroe Ranch, Palm Springs, California, U.S.A.; that he does not know Mr. Lyons' parents but believes that they are alive, and that he, Parrick, met Jane Lyons approximately 10 years ago and have been good friends since.—Questioned about Mr. James A. Lyons death, he declared the following: "Yesterday, at 7 o'clock in the morning, James, Dr. Homer P. Rush, Antonio Ruiz and his youngest son, and myself, went to the fields with the purpose of hunting doves. Upon our arrival, each one went in different directions, I took Mr. Ruiz' son with me. After a while, we heard two or three shots and shortly, somebody calling for help. We ran to where the voices were coming from and found that Dr. Rush and Antonio Ruiz had arrived first and were trying to take James, who was breathing with difficulty, out of some bushes, We all helped to take him out of the bushes and saw then that he had some excoriations and gun-powder burns on his right cheek and neck. We all tried to help him but nothing could be done, he died almost immediately. We left the body at the same place and I took off my shirt to cover his face in order to protect it from the sun. Mr. Antonio Ruiz C. went to inform the authorities of Cabo San Lucas, and returned after a while with the Sub-Delegate of the Government, who, after taking our declarations, went back to Cabo San Lucas leaving a Policeman to watch over the corpse".—The witness in the act believes that Mr. Lyons' death was accidental, and requests that after the autopsy, the corpse be delivered to the airplane pilot Mr. Henry F. Perci who will take care of the funeral.—This declaration was given by the assistance of the interpreters who translated it into

the spanish language and after being read and approved was signed at the margin before me, Prosecutor, and attesting witnesses.—Robert J. Parrick, signature.—M. Galindo S, signature.—Educdrdo Ruiz C, signature.—Alberto Ceseña Dodero, signature.—Jose Prisciliano Ceseña, signature,—Abel Green M, signature.

On the same date, February 11, 1953, the undersigned, Prosecutor of this town and the witnesses, attested the legal autopsy of the corpse of the North American national Mr. James A. Lyons.—We certify.—The Prosecutor, Alberto Ceseña Dodero, signature.—Witness, Jose Prisciliano Cesena C, signature.—Witness, Abel Green M, signature.

Fausto Peralta Bañaga, Sub-Delegate of the Government at Cabo San Lucas of this jurisdiction, who was summoned by this Public Ministry, declared under oath, to be named as it is above state, Mexican nationality, catholic, married, 40 years of age, Federal employee, born at La Playa of this Port, with address at Pablado de Cabo San Lucas.—When questioned about the facts under investigation, he replied:—"Yesterday, around 8 o'clock, Mr. Antonio Ruiz Cassezus came to my office and announced that in the fields near the road to this town was a dead man of North American nationality, who accidentally injured himself with the 12 guage shutgun he carried. I immediately went to the mentioned place and found the corpse and two other North American citizens named Dr. Homer P. Rush and Robert J. Parrick. On the ground, about 3 meters from the corpse, was a shutgun, which I picked up. The two friends of

the deceased informed me that around 7 o'clock, same date, they arrived to such place with the purpose of hunting doves and rabbits, that they were all happy and friendly and the Mr. Lyons' death was accidental.—The foregoing declaration was ratified and signed before me, Prosecutor, and attesting witnesses.—At the margin, with ink, an illegible signature.

February 11, 1953.—In my presence and that of the witnesses, Mr. Antonio Ruiz Cassezus, who was summoned by this Public Ministry, declared under oath, the following:—To be named as it is above stated, 50 years of age, Mexican nationality, catholic, married, merchant, born and addressed at Cabo San Lucas.—Questioned as to the events of February 10, 1953, he declared:—"Yesterday, at 7 o'clock, Dr. Homer P. Rush, Mr. James A. Lyons, and Mr. Robert J. Parrick, invited me to join them with the purpose of hunting doves. We drove in my car and once at the fields each one of the party went in different directions. James A. Lyons and Robert J. Parrick carried 12 gauge shutguns; Dr. Rush and myself, 22 caliber rifles.—About 8 o'clock, I heard two or three shots, and shortly somebody calling for help. I ran to the place where the voice came from and found Dr. Rush trying to carry James out of some bushes. Robert J. Parrick and my son came then; we all tried to help James but nothing could be done. I went then to state the case to the authorities of Cabo San Lucas, and returned latter with the Sub-Delegate of the Government".—The declarer's opinion is that James A. Lyons' death was accidental, and certifies that when they depart, he looked happy and in good health.—After ratify-

ing his declaration, Mr. Ruiz Cassezus signed it before me, Prosecutor, and witnesses whereof.

On February 11, 1953 this Public Ministry received, in duplicate, the Doctor Certificate issued by the physicians Armando Serrano Anaya and Eduardo Rodriguez Cota.—In witness whereof, we have hereonto set our hand.—Jose Prisciliano Ceseña C.—Abel Green M., (signatures).

The witnesses of this Public Ministry put into the hands of the Prosecutor, the Doctor Certificate issued by Dr.Armando Serrano Anaya and Dr. Eduardo Rodriguez Cota, concerning the legal autopsy practiced in the corpse of the North American citizen James A. Lyons.—February 11, 1953.—Jose Prisciliano Ceseña C.—Abel Green M.—signatures.

On the same date, February 11, 1953, the Prosecutor resolved:—To congregate the medical report to the files of this case.—We hereonto certify:—Alberto Ceseña Dodero, Prosecutor.—Jose Prisciliano Ceseña C.—Abel Green M.—Signatures.

In view of the foregoing, hereinto ended the day record of proceedings.—In witness whereof, we have hereonto set our hands and affixed the seal of this Public Ministry.—Alberto Ceseña Dodero, Prosecutor.—Jose Prisciliano Ceseña C, witness.—Abel Green M, witness.—signatures.

DELIVERY OF THE CORPSE.

San Jose del Cabo, B.C., February 12, 1953.—I, Alberto Ceseña Dodero, Prosecutor of this town attested

by witnesses, have given away the corpse of the North American national Mr. James A. Lyons to the airplane pilot Henry F. Perci, who, after receiving it, signes this minute by common consent.—At the margin.—Henry F. Perci, signature.—We attest:—Alberto Ceseña Doder, Prosecutor.—Jose Prisciliano Ceseña C, witness.—Abel Green M, witness. signatures.

San Jose del Cabo, Lower California, February 12, 1953.—The Prosecutor attested by witnesses, resolved:—That inasmuch of the denunciation made by telephone by the Sub-Delegate of the Government at Cabo San Lucas, Mr. Fausto Peralta Banaga, after having found dead in “Los Llands” a man of North American nationality, and according to the Doctor Certificate issued by the Physicians Armando Serrano Anaya and Eduardo Rodriguez Cota, who practiced the legal autopsy on the corpse of that man, who was called JAMES A LYONS, a North American national, and which certificate established that the corpse was examined and that the death was due to an aortic insufficiency which caused a sudden cardiac fatigue, having found also ateromatic plates in the coronaries. In view of the above and prior to the identification of the corpse, and with the transcription of the present resolution, send a communication to the Judge of the Registry of this town, to the effect that a minute be inserted in the book of deaths of this year, for which purpose, description of the deceased are hereby given, according to the identification of the corpse: James A. Lyons, North American national, married, fifty years of age, his wife is Jane Lyons, residence: Smore Tree Ranch, Palm Springs, Calif., U.S.A.—This

transcription, attached to the doctor certificate to be returned, is to be inserted in the correspondent minute.—San Jose del Cabo, B.C., February 12, 1953.—The Prosecutor, Alberto Ceseña Dodero.—signature.

On the same date, February 12, 1953, communication inserting the foregoing resolution was sent to the Judge of the Registry of this town, to be inserted in the book of deaths of this year.—Signed: Alberto Ceseña Dodero, Prosecutor.

PROOFS SIGNED IN DIFFERENT RECEIPTS.

I, Howard W. Irwin, received from Alberto Ceseña Dodero, Prosecutor of this town, a 12 gauge shutgun that belonged to the deceased James A. Lyons, North American citizen, with the purpose of deliver it to his wife Mrs. Jane Lyons.—Signed, Howard W. Irwin.—Address: Portland, Oregon, United States of America.

Received from Mr. Alberto Ceseña Dodero, Prosecutor of this town, \$9.00 (nine dollars), and a small metall clasp-knife with the deceased name on, to be delivered by Mr. Robert J. Parrick to Mrs. Jane Lyons.—Fernando Chacon, illegible signature.—Certified:—Alberto Ceseña Dodero, Jose Prisciliano Ceseña C, Abel Green M,—signatures.

With the foregoing, the day record of proceedings is closed.—In witness whereof, we have hereunto set our hand and affixed the seal of this Public Ministry.—Alberto Ceseña Dodero, Prosecutor.—Jose Prisciliano Ceseña C, witness.—Alberto Green M, witness.—signatures.

—DOCTORS' OPINION—

Having been requested by the Prosecutor of this Town as Auxiliary Legist Doctors, the undersigned, Dr. Armando Serrano A, and Dr. Eduardo Rodriguez C, went, at 10 o'clock February 10, 1953, to "Los Llanos", at Cabo San Lucas, of this jurisdiction, to examine the corpse of a man of North American nationality.—At a distance approximately of one meter from the road, under some bushes, covered with a canvas to protect it from the sun, was a masculine corpse wearing blue trousers, gray sport shirt with short sleeves, gray socks and brown shoes. The body was laying on its right side, from North to South, the head over a sack, the arms outstretched and the legs bent at the knees; rigor mortus had set in, specially around the face and neck.—At 3, 12 and 16 meters South from the corpse, were found 3 shotgun shells.—About 3 meters on the same direction, were 4 dead doves.—There was blood on his face and neck, but none on his body or on the ground.—Having proceeded to examine the corpse, we deducted that the man died four or five hours before.—According to Articles 220 and 221 fractions II and III of the Organic Law of the Court of Justice of the District and Federal Territories, the body was transferred to San Jose del Cabo, B.C., where the legal autopsy was practiced. The report is as follows: "Corpse of a man approximately of 50 or 55 years of age, strong build, white complexion, about 1.85 meters in height, abdominal perimeter 85 centimeters, thorax perimeter 93 centimeters, temperature: cold and rigid.—Cyanosis on the head, neck, thorax and fingernails.—Abundant hair mostly gray, green

eyes, flat nose, black eyebrows, normal size mouth, clean shaved. All dental pieces complete, protossis in the first and second right upper molar teeth. The tongue was pressed between the dental rows. Transversal skin lines on the forehead, neck and nucha.—Gun-powder grains were found incruited in the neck, right side of the face, eye-lid and ear. In the right side of the forehead, near the hair line, was found a hole of about 1 millimeter in diameter.—Also were found excoriations in the right arm and hand.—At separating the hair-skin off the skull, was noticed that the hole in the forehead did not reach the bone.—Normal osseous sutures, higher longitudinal sinus with a small liquid black blood, slightly soft brains.—Vertebral, basilar and cerebrine arteries, and hexagon of Willis, no alteration.—The neck vascular nerves were dissected, having found no alterations.—Tongue hard and pressed between the teeth, normal pharinx and larynx, and esophagus and trachea were dissected, having found no alterations.—**THORAX.**—When costal sternon brest plate was lifted, costal chondro ossification was found.—Abundant and strong pleuroparietal adhesions in the posterior face of the sternon and hemithorax.—Congestioned lungs, when cut in sections black liquid blood drained off.—Left lung lobule, superior and inferior functioned.—Encreased pericardium with strong adhesions on the diaphragm.—Heart surrounded by a thick coat of greasy tissues.—Left ventricle slightly hipertrophied, fattened and hardened aortic sigmoides with ateromatic pockets, left auriculoventricular ring slightly exuberated. The coronary arteries were dissected having found ateromatic plates.—**ABDO-**

MEN.—Dark red liver, encreased in weight and size, resistant to sectional cut. Gall-bladder full of dark green bile, in a quantity of approximately 40 c.c., it had also 2 calculus, 1 of 1 cm. and the other of 3mm. in diameter. —Remainder abdominal organs without any pathologic alterations.—CONCLUSIONS: We consider that the death was due to “an aortic insufficiency that probably provoked a sudden cardiac fatigue”.—Secondary injuries connected with the cause of death. —Ateromatic plates in the coronaries (coronary insufficiency), hepatic congestion in the lungs.—Other injuries not related with the cause of death:—Excoriations in the face and neck, gun-powder grain incrustations, bile lithrasis.—Under oath and as to our knowledge and understanding, we, Auxiliary Legist Doctors, per request of the Prosecutor of this town, extend this certificate at Villa de San Jose del Cabo, Southern Territory of the Lower California, Mexico, on February eleventh nineteen fifty three. — THE EXPERT AUXILIARY DOCTORS. — Signed.—Dr. Armando Serrano A.—Dr. Eduardo Rodriguez C.

February 13, 1953.—In view of the foregoing, the day record of proceedings is closed.—Signed, Alberto Ceseña Dodero, Prosecutor.—J. Prisciliano Ceseña, witness.—Abel Green M., witness.

San Jose del Cabo, Lower California, February 14, 1953.—The Prosecutor of this town RESOLVED:—That being under the judgement of this Social Authority to set this case, and inasmuch as the investigation whereof is completed, a final resolution is to be forwarded, ac-

ording to the Law.—The Prosecutor, Alberto Ceseña Dodero, signature.—Witness, Jose Prisciliano Ceseña, signature.—Witness, Abel Green M, signature.

San Jose del Cabo, Lower California, February 15, 1953.—As it has been judged, the prior investigation number 1,3,7,(7)/53 carried out by this Public Ministry in regard with the death of the North American national who was called JAMES A. LYONS, and IN VIEW OF: I.—The denunciation made by telephone on February 10, 1953 by the Sub-Delegate of the Government at Cabo San Lucas of this jurisdiction, Mr. Fausto Peralta Bañaga, after having found dead at “Los Llanos” the socalled North American national; cognizance of the facts by personnel of this OFFICE and physicians Armando Serrano Anaya and Eduardo Rodriguez Cota; investigations made in case of delinquency and minute inserted according to Article 16 of the FEDERAL CONSTITUTION; summoned witnesses Dr. Homer P. Rush, airplane pilot Robert J. Parrick and Antonio Ruiz Cassezus; Doctor Certificate issued by the physicians who practiced the legal autopsy of the corpse, which states that Mr. JAMES A. LYONS death was due to an AORTIC INSSUFFICIENCY THAT PROVOKED A SUD- DEN CARDIAC FATIGUE.—II.—According to articles 42 and 43 of the Organic Law of the INSTITUTION, the undersigned, Prosecutor, has RESOLVED: That the case is not subject to delinquency and that no judicial investigation is to be followed.—III.—When this resolution is approved by the General Proctor of Justice of the District and Federal Territories, to whom the judicial proceedings of this case are to be sent to,

this investigation is to be deposited in the files of this Public Ministry.—Resolved and signed by the Prosecutor attested by the witnesses.—Alverto Ceseña Dodero.—Jose Prisciliano Ceseña C.—Alberto Green M.—Signatures.

This is an authentic copy of the original, to be sent to Attorney Jose Bernal Lopez, Prosecutor of the city of La Paz, B.C., as per request in communication number 83, dated February 26, 1953, to be delivered to the GOVERNOR OF THE SOUTHERN TERRITORY, La Paz, Lower California.

San Jose del Cabo, B.C., March 4, 1953.

Witness:	The Prosecutor:	Witness:
J. P. Cesena.	Alberto Cesena Dodero.	Abel Green M.
(signature)	(signature)	(signature)

At the margin:—A seal of the Public Ministry at San Jose del Cabo, Lower California.—Mexico.

